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In the Supreme Court of the United States

OCTOBER TERM, 1943

THE UNITED STATES, PETITIONER

v.
STANDARD RICE COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF CLAIMS

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★ (1)

In the Supreme Court of the United States

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No. 944

THE UNITED STATES, PETITIONER

v.

STANDARD RICE COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled cause on February 7, 1944.

OPINION BELOW

The opinion of the Court of Claims (R. 37-41) is reported in 53 F. Supp. 717.

JURISDICTION

The judgment of the Court of Claims was entered February 7, 1944 (R. 41). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Respondent agreed to sell rice to the United States under a contract which provided that prices paid included any federal tax heretofore imposed by Congress which was applicable to the material involved and that any tax "which may hereafter (the date set for the opening of this bid) be imposed by the Congress and made applicable to the material on this bid will be charged to the Government and entered on invoices as a separate item." The United States paid respondent the full contract price on the rice delivered, but respondent did not pay any processing tax on the rice, due to the fact that the Agricultural Adjustment Act was declared unconstitutional.

The question involved is whether the price under the contract should be reduced by the amount of unpaid processing tax.

STATUTES INVOLVED

Budget and Accounting Act, 1921, c. 18, 42 Stat. 20:

SEC. 305. Section 236 of the Revised Statutes is amended to read as follows:

"SEC. 236. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in

the General Accounting Office." (31 U. S. C., Sec. 71.)

Agricultural Adjustment Act, c. 25, 48 Stat. 31,
as amended:

SEC. 9. (a) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that any one or more payments authorized to be made under section 8 are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation; * * *. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that all payments authorized un-

der section 8 which are in effect are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture * * * (7 U. S. C., Sec. 609).

MISCELLANEOUS

SEC. 10. * * *

(c) The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title. Any violation of any regulation shall be subject to such penalty, not in excess of \$100, as may be provided therein.

* * *
(7 U. S. C., Sec. 610.)

COMMODITIES

SEC. 11. As used in this title, the term "basic agricultural commodity" means wheat, rye, flax, barley, cotton, field corn, grain sorghums, hogs, cattle, rice, potatoes, tobacco, peanuts, sugar beets and sugarcane, and milk and its products, and any regional or market classification, type, or grade thereof; * * * (7 U. S. C., Sec. 611).

STATEMENT

The special findings of fact of the Court of Claims (R. 33-37) may be summarized as follows:

On November 13, 1935, respondent, a corporation engaged in the business of milling rice for sale, entered into a contract with the United States under which respondent agreed to supply rice to the Navy Department at the bid prices specified in the contract. The contract contained the following provision (R. 35):

Prices bid herein include any federal tax heretofore imposed by the Congress which is applicable to the material on this bid. Any sales tax, duties, imposts, revenues, excise or other taxes which may hereafter (the date set for the opening of this bid) be imposed by the Congress and made applicable to the material on this bid will be charged to the Government and entered on invoices as a separate item.

In accordance with the terms of the contract, the respondent delivered to the United States 584,800 pounds of milled rice and received full payment from the United States in accordance with the terms of the contract (R. 36).

Respondent, as the first domestic processor of rice, paid the processing taxes imposed by the Agricultural Adjustment Act from April 1, 1935, to September 20, 1935. Before paying the processing tax on the rice processed for the month of October, 1935, respondent obtained an injunction against the Collector of Internal Revenue prohibiting the collection from it of any further processing taxes. Respondent did not pay to the United States processing taxes on the

supplies furnished to the United States under the contract here involved, such taxes amounting to \$8,479.60. (R. 35.)

The Comptroller General asserted claim against respondent for the above amount of \$8,479.60 on the theory that there had been an overpayment by the United States on the contract, since respondent had failed to pay the processing tax on the rice delivered under the contract (R. 35-36). Overassessments of income tax were determined in favor of the respondent for the fiscal years ending July 31, 1935, and July 31, 1938. Of these overpayments the amount of \$8,479.60 was not refunded to respondent but was credited by the Comptroller General against the indebtedness for processing taxes. (R. 34, 36-37.) Respondent paid to the Collector of Internal Revenue for the First Texas District unjust enrichment taxes on account of its having been relieved of the payment of the processing taxes. This unjust enrichment tax was computed and assessed upon the basis of the inclusion of units involved in the claim of the Comptroller General. If those units had been excluded, the unjust enrichment tax would have been reduced by the amount of \$1,706.59. (R. 37.)

¹ The Government conceded in the court below that in view of certain language in the case of *United States v. Kansas Flour Corp.*, 314 U. S. 212, 216, if respondent is required to reduce its price by the amount of the unpaid processing tax, it is not subject to the unjust enrichment tax on these transactions.

After the refusal of the Comptroller General to refund the amount of the processing taxes, this suit was brought in the Court of Claims; and that court, on February 7, 1944, entered judgment in favor of the respondent for \$8,479.60, with interest (R: 41).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1..In holding that the Comptroller General was not entitled to credit, against amounts due for overpayments of taxes, amounts paid to respondent under the contract in reimbursement for processing tax which the respondent never paid.

2. In failing and refusing to hold that the contract provision that the price included taxes then in effect contemplated that the vendor would pay the processing taxes to the Government.

3. In failing to enter judgment for the United States and dismissing the petition.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below to the effect that the Government is not entitled to the amount of the processing taxes included in the contract price, but not actually paid by the respondent, is in direct conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in *United States v. American Packing & Provision Co.*, 122 F. 2d 445, certiorari denied, 314 U.S. 694. The *American Packing & Provision Co.* case in-

volved two types of contract, one type being almost identical with the contract in this case and the other type being similar to those involved in the case of *United States v. Kansas Flour Corp.*, 314 U. S. 212. This latter type of contract contained a so-called "up and down" provision, i. e., that if taxes were hereafter imposed or changed by Congress then the prices named in the contract would be increased or decreased accordingly. The Circuit Court of Appeals made no distinction between the two types of contract but decided in favor of the Government on the basis of unjust enrichment rather than on the basis of the specific language of the contracts. That court held that since the price paid by the Government included taxes which the vendor did not pay, the vendor received a benefit from the Government which in justice and good conscience should be returned. To the same effect is the decision of the District Court for the District of Massachusetts in *Suncook Mills v. United States*, 44 F. Supp. 744.

2. The decision below is in conflict with the principle of the *Kansas Flour Corp.* case. That case, as already stated, involved contracts similar to the second type referred to in the *American Packing & Provision Co.* case. It is true that this Court discussed this "change" provision and held that recognition by Congress of the invalidation of the Agricultural Adjustment Act by the legislation embodied in the 1936 Revenue Act

amounted to a "change by the Congress." However, we submit that the decision of this Court did not hinge on the fact that the contracts contained such provisions but that that decision is broad enough to cover the type of contract involved in the instant case. We believe the real basis of that decision to have been that the parties to the contract contemplated that the vendor would have to pay the processing tax and the sale price was *pro tanto* offset by the amount of the tax (p. 214). With regard to the contention advanced in that case by the vendor that the Government was not entitled to maintain its set-off because the contract contained no specific undertaking by the vendor that it would pay the tax, this Court pointed out that since the Government, as distinguished from most private contractors, did not buy for resale, it would suffer a definite disadvantage unless it received the taxes. It then, in a footnote (p. 216), referred to the case of *United States v. American Packing & Provision Co.*, *supra*, stating that in that case—

the Government was held entitled to maintain a set-off asserted under conditions like those here involved on the ground that the vendor had received money from the Government which in equity and good conscience it should repay.

Petition for certiorari in the *American Packing & Provision Co.* case was pending while the *Kansas Flour Corp.* case was under consideration.

The Government requested that action upon the petition should be postponed until the final decision in the *Kansas Flour Corp.* case, and certiorari was denied one week after the final decision in the *Kansas Flour* case. This Court moreover referred to the *American Packing & Provision Co.* case in a footnote in the first part of its opinion (footnote 2, p. 214) as among the number of pending cases involving the same problem as the *Kansas Flour* case, and therefore justifying certiorari in the latter case. We believe that all this is indicative of the fact that the principle enunciated in the *Kansas Flour* case should be applied here.²

3. The question is of considerable importance, as we are advised by the Comptroller General that there are several hundred contracts which involve this question. The conflict between the decision of the court below and that of the Tenth Circuit should be resolved in order to avoid confusion and continued litigation.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY, *Solicitor General.*

APRIL 1944.

² The *Suncook* case was decided after the *Kansas Flour Corp.* case and the District Court was of the opinion that that decision was applicable to contracts containing provisions similar to the one in this case.

